No. 3850

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARTLAND LAW, EUGENE D. N. E. LEHE, MELVILLE W. LAWRENCE and H. O. COMSTOCK, copartners, doing business as LAWRENCE & COMSTOCK, NELLIE COPLAND and JOHN DOE COPLAND (her husband),

Plaintiffs in Error,

vs.

ARTHUR L. SMITH, dam gate-keeper, A. P. DAVIS, chief engineer and director, F. G. HOUGH, late project superintendent, JOHN F. TRUESDELL, special assistant to the attorney general of the United States reclamation service,

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

JOHN E. BENNETT,
OLIVER DIBBLE,
Attorneys for Plaintiffs in Error.

No. 3850

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARTLAND LAW, EUGENE D. N. E. LEHE, MELVILLE W. LAWRENCE and H. O. COMSTOCK, copartners, doing business as LAWRENCE & COMSTOCK, NELLIE COPLAND and JOHN DOE COPLAND (her husband),

Plaintiffs in Error,

vs.

ARTHUR L. SMITH, dam gate-keeper, A. P. DAVIS, chief engineer and director, F. G. HOUGH, late project superintendent, JOHN F. TRUESDELL, special assistant to the attorney general of the United States reclamation service,

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

The defendant in this case is Arthur L. Smith, keeper of the dam at Lake Tahoe, in the employ of the United States, and handling the dam as a part of the Truckee-Carson Reclamation Project,

now called the Newlands Project, whereby water is impounded in Lake Tahoe, a public navigable body of water, some twenty-six miles long by thirteen broad, for conducting through canals and the irrigation of lands in the State of Nevada. The plaintiff is one of four plaintiffs, whose cases were consolidated for trial, who owns land riparian to the lake. The dam in question is located at the outlet of the lake, where the water passing from the lake forms the Truckee River. The dam is provided with movable gates, and these have for some years been operated by defendant and his employer, the United States Reclamation Service, for the purpose of raising water in the lake and so impounding it for the uses of the irrigation canals, releasing the water at such time as may meet the requirements of that system.

The complaint alleges that on the 30th of June, 1916, the defendants were so operating this dam at the mouth of the lake; that they then and there shut down the gates of the dam and raised the waters of the lake upon the lands of plaintiff where they did certain damage alleged to be of the amount of five thousand dollars.

The case was not tried on its merits but went off on a nonsuit upon motion of defendant on the ground that the action disclosed was not trespass, but trespass on the case, and that as such it was barred in two years after the alleged occurrence, whereas the suit was not filed until after two years from the date of the happening. That is to say:

that the action fell under section 339 of the Code of Civil Procedure of California, and not under section 338, subdivision 2, thereof. Section 339 has limitation of two years and section 338, subdivision 2 has three years. If the action should be found by this Court to fall under section 338, subdivision 2, then it was filed in time, and the judgment would be reversed and the cases remanded for the trial to proceed with. If however the Court should find that the action came under section 339, then the ruling of the Court below would be correct and the judgment would be affirmed.

Specification of Errors Relied Upon.

The limitations of the respective sections:

Section 339 provides:

> "Within two years: An action upon a contract, obligation or liability not founded upon an instrument of writing:"

Section 338, subdivision 2 provides:

> "Within three years: An action for trespass upon real property."

The question is was this act of raising the waters of the lake upon the land of plaintiff trespass upon real property, or was it something else? Counsel for defendant claims it was not trespass but was trespass on the case, a distinction which, of course,

does not go to the merits of the action but to the form under which the action is brought.

The dam, as stated, was at the mouth of the lake, and through its manipulation by defendant the waters of the lake were made to rise. In shutting down the gates it was the direct purpose and intention of defendant to raise the waters upon the lands of plaintiff, and upon the lands of all other parties around the lake. The purpose was, in other words, to add the shore lands to the lake bottom and use them for impounding water upon to the end that the Reclamation District might have more water to draw off for its system. This fact is very important: as to what the object, intention and design of defendant was in shutting down the gates of the dam. The dam is a mere structure across a public body of water the surrounding lands of which are owned by private parties. Defendant was not raising waters on his own lands which having filled his own lands overflowed from thence upon lands of another, his object in shutting down the gates being not to overflow the others' lands but to overflow his own lands—such was not the case. His purpose was to lift the waters upon the lands of other people, to hold them there as long as he liked,—he held them there throughout the season—then draw them off when it was to his interest to do so. It would be difficult to see how there could arise a plainer, flatter case of a direct, intentional, purposeful and successful invasion of private property through any instrument which it

might please the invader to employ for this purpose, than by this defendant using the dam to pour the waters of the lake upon these lands and to hold such waters there in place until he got ready to let them go.

The ruling of the Court below—not on the demurrer, for Judge Bean overruled the demurrer, but on the nonsuit by Judge Van Fleet, by which the ruling of Judge Bean was disregarded—here the ruling was that when Smith shut down the dam gates he did the act which he intended; such was his direct act; the lifting of the waters of the lake upon plaintiff's lands was not a direct act but was *a consequence* of his shutting down the gates, hence the impounding of the waters upon plaintiff's lands was a consequential or resulting incident and the action was therefore not trespass but trespass on the case. If this reasoning be correct then we submit, trespass could never occur. For always it would be said, whatever instrument the invader might employ, whether such be a pistol to a fire a shot or a horse to drive over and upon one's land, that the intruder did not intend to enter the land which was the definite object of his endeavor, but that he merely intended to actuate the instrument through which invasion of the land was effected.

The act of defendant was a *taking of the land* out of the possession of plaintiffs into possession of defendant. Defendant himself admits this. He claims to have done what he did as a matter of

right. In other words, he claims by his answer an *easement* in the land, and claims to have acquired it by prescription. The action which plaintiff might have brought was ejectment, and the allegation would be ouster. From defendant's standpoint he was entering the property as his own property; from plaintiff's standpoint he was invading the property. Can there be any doubt that the act of defendant, unless he had an easement to do what he did, was trespass?

1 Chitty on Pleadings, 196.

The case at bar is similar in fact and in law to Conniff v. San Francisco, 67 Calif. 49, which has never been overruled, and which is now the law in California. That case like this was the flooding of land by the daming of a public water course, the run being a natural creek on Montgomery Street and the land being a lot of an adjacent owner. In repairing the street the city dammed this stream the result being that the water was backed up over the lot. The question there, as here, was whether the case was case or trespass with a view to determining whether the action should have been brought in three or two years. It was held to be trespass. The Court says:

> "We know of no principle of law which justifies either a corporation or individual in stopping up by an embankment or dam a natural channel by which surface waters escape, obstruct the natural flow of such waters and cause them to run over and permanently remain on another's property. Such conduct would be a most flagrant trespass on the rights

of another in the shape of a direct invasion of his land amounting to a taking of it within the rule laid down in Pumpelly v. Green Bay Co., 13 Wall. 166.

"The case before us is not one of mere consequential damages which the landowner must protect himself against, and for which the law affords him no redress. It is a direct trespass upon the property of the plaintiff by the construction of a dam which a moment's reflection would have made clear to anyone, must have inevitably in the course of nature have resulted in the permanent overflowing of the land of plaintiff when the rainy season came. * * * The plaintiff had three years in which to bring this action. *The action complained of was a trespass on real property, and the action for damages caused by it was not barred for three years from its accrual.*" (Italics ours.)

The case of Pumpelly v. Green Bay Co., supra, which the Court refers to, declared that the daming of a navigable stream which raised water upon adjacent land was a taking of such land, and rejected the contention of defendant, made there as here, that the damage was consequential. The Court say:

"It remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed upon it, so as to effectually destroy or impair its usefulness, *it is a taking,* (italics ours) within the meaning of the constitution, and that this position is not in conflict with the weight of judicial authority in this country and certainly not with sound principle."

Counsel replies as to this case that it is laid in trespass on the case and not in trespass. But a taking of land is not trespass on the case; it is trespass. No attention was paid by the Court to the form of the action, and the point was not raised. One may waive trespass and bring case, but however this may be, the Court was not talking case but trespass.

Kelley v. Lett, 35 N. C. 50;
3 Blackstone Comm., 123;
Gale v. Miles, 3 Conn. 70;
6 Cyc., 684.

In view of the Conniff case there would be no difficulty about the case at bar, and no question at all that the period of limitations was three years, were it not for the fact that the Supreme Court of California has a line of cases in which the plain rule laid down in Conniff v. San Francisco, following as it does the rule of Pumpelly v. Green Bay, is to some minds confused, but when carefully examined show themselves to leave the rule of Conniff v. San Francisco untouched. These cases are Hicks v. Drew, 117 Cal. 305; Daneri v. So. Cal. Ry. Co., 122 Cal. 507; Crim v. San Francisco, 152 Cal. 279, and the rule applied in the Superior Court, though deemed not applicable to the facts by both the Appellate Court and the Supreme Court, in Porter v. Los Angeles, 29 Cal. App. Dec. 148, and 182 Cal. 515. These cases, starting with Hicks v. Drew, undertake to assert what was case and what was trespass at common law. They then conclude

that where a man is using his own land and the result of such use is to injure the land of another, that the action of such other against the first would be case; that is, the act would not be a direct invasion of the other's land but would be an indirect and consequential invasion of such land, in that what the first—call him A—was doing was the thing he had a right to do, to wit, use his own land; but that in using his own land he injured the land of another, such injury would be a consequence, hence not a direct thing—which would be trespass—therefore it would be case.

So we find in each of these cases the defendants were doing something to protect their own lands. In Hicks v. Drew he had erected a bulkhead on his land which diverted the storm waters flowing in the street from his land and directed them upon the land of the plaintiff. The Court held that these waters thus made to flow upon the lands of plaintiff was not trespass on part of defendant, but was case; that is, the flowing of such waters was a consequence of defendant's act in protecting his land; the object of defendant in setting up the bulkhead was not to put water on plaintiff's land, but was to keep the water from coming on to his own land, and this, the Court held, defendant had a right to do.

The reasoning is bad and the law is erroneous if we shall look to what case was and what trespass was at common law. For at common law the action in Hicks v. Drew would have been trespass

and not case. Case at common law was not what the California Court here thought it was. It was not an injury to another consequent upon one using his own; for if one so used his own as to do injury to another that injury was a direct and not an indirect act. Case was differentiated from trespass in that case lie for injuries committed without force, or for forcible injuries which damaged the plaintiff consequently only. The essence of trespass was force and injury resulting from force (1 Bouv. Law Dict., p. 288). Thus, if defendant raised water on plaintiff's land, that was trespass, for it was a thing done with force—it was a forcible entry of the land. But if the injury caused thereby to plaintiff was not injury done to the land, but because of the raising of water on the land plaintiff lost a sale of the property, and the action was to recover for this loss, such action would be not trespass but case. This is a very different principle from that in which a person finds it to his interest to injure the property of another in order to protect his own, which under all circumstances is trespass under the principle of the common law, a principle which was confused by the erroneous reasoning of the celebrated Lighted Squib Case in Smith's Leading Cases. In a case tried in England about thirty years ago three defendants were charged with murder. A ship had been wrecked, leaving four survivors afloat at sea in a boat, one of whom was a boy. The four were starving and

the three decided to kill the boy and eat his body that all might not perish. They did this and the three thereby survived. The question rose in the English Court, was this murder, or was it something else? It was held to be murder. And the reason it was such was that the three had no right to kill another in order to preserve their own lives. That the boy had as much right to his life as they had to theirs, and they could not protect their lives by destroying his. If the action there had been civil instead of criminal could there have been any doubt that the act of the three upon the boy was trespass and not case? It was the theory of the defense at that trial that in killing the boy they were merely protecting their own lives and this they had a right to do, that the destruction of the boy therefor was merely a consequence of their doing the thing which they had a right to do, hence the act was not murder but manslaughter. This is precisely the position that was upheld in Hicks v. Drew with respect of property, and is followed in the other cases cited. That by protecting one's own property, which one has a right to do, one thereby injures the property of another, that such injury is a consequence, which makes it case—or in criminal law, manslaughter, and not trespass, or in criminal law, murder.

Nevertheless whether the reasoning in Hicks v. Drew be wrong or right it has no application to this case at bar. For here the object of defendant was not to use his own property, but to use plain-

tiff's property. The dam was merely the instrument which he employed in getting the water of the lake up upon the plaintiff's land, which was where he wanted it, in order that it might be there held for his further purposes. The case is altogether different from where one owns the bed and banks of a stream and puts in a dam with the object of raising the water upon his own lands and not upon the lands of another, but an unprecedented flood comes and the water is raised upon the lands of another lying higher up, this in some cases has been held to be an injury to such other in case and not in trespass, in that it was not the object or intention of the owner of the dam to raise water upon other's land but upon his own land, and the overflow upon the other's land was the result of an unintentional act of the dam owner, a consequence of rightfully using his own land. This is the kind of case cited by the Court in Hicks v. Drew as being taken from Gould on Waters, section 210. But all such has no bearing here, since here the deliberate purpose of the defendant was not to raise water upon any land that he had, but to raise water on the land of plaintiff. Whether he had a right to do that by easement, as he states in his answer is altogether another question, which was not reached at the trial, and which plaintiff is prepared to meet when he comes to it.

Although it is repeatedly asserted by counsel for defendant that Hicks v. Drew overrules Conniff v. San Francisco, and Judge Bean seems to find the

two cases to be "not in entire harmony", yet in Hicks v. Drew the Court distinctly says that "the facts in the case at bar do not bring it within the doctrine of Conniff v. San Francisco" (p. 311). And they do not. The City of San Francisco was not engaged in using land of its own when it turned the water onto Conniff's land, as Drew was, and which comprises the essence of all those cases—Daneri v. So. Cal. Ry. Co., and Crim v. San Francisco—so that the flooding of plaintiff's land was a consequence of the using by defendants of their lands, or for protection of their lands. Here there was a lifting of the waters of the lake and impounding them upon the land of plaintiff for the purpose of storage of such waters upon such lands; of adding the lands of plaintiff, as we have remarked, to the bottom of the lake, for the purpose of increasing the reservoir capacity of the lake in order that defendants might store more water than they had theretofore done, a thing which, as we state the defense of defendant is that he had an easement to do, a permanent property in doing so. He alleges in his answer that he was operating said dam in "controlling the water levels of said lake". And he avers (tr. p. 7) that he did not

> "Shut down said gates and thereby caused the surface of the lake to rise to the height of 6229.8 feet above sea level, and alleges the fact to be that on or about the 30th day of June, 1916, the surface waters of said lake attained the level of 6229.8 feet above sea level, and that the gates of said dam were so operated and used under the power and authority, conditions and limita-

> tions aforesaid, as to result, in combination with natural causes, in the attainment of said level."

The answer then says (p. 10) that defendant has a full right to do what he did:

> "and at all times mentioned in said complaint have and have had a full right and power to raise the level of Lake Tahoe to more than the elevation of 6229.8 feet above sea level as against plaintiff, not only because of the authority and set out in such constitution and laws, and particularly those relating to arid lands as aforesaid, but also because of the fact that the United States, through itself and its predecessors in interest, has acquired and now owns the right, privilege and easement to regulate said lake, and to raise the level thereof to said elevation, 6229.8 feet above sea level, and, indeed, to a higher level, by prescription as against plaintiff and his lands described in the complaint, and to overflow said lands by that means, in that it and they have so regulated said lake continuously and raised the level of said lake to said elevation and more, in and upon the lands described in the complaint and against and adversely to the owners thereof and all those having an interest therein, including the plaintiff and his predecessors in interest, and have in that way and by that means overflowed said lands continuously and whenever required in connection with its and their storage operations and regulation of said lake for a period of more than five years prior to the commencement of this action, and for a period of more than five years prior to the date set forth in the complaint herein of the alleged injury to plaintiff's lands."

Herein there is a statement of that continuous flooding which constitutes a taking under the cases cited. Defendant, according to his statement, is now

doing it, he did it at the time stated in the complaint, he has always done it and he intends to continue to do it. Clearly here is a taking of the land. To hold that such act is trespass on the case and not trespass is to abolish the law of trespass.

The case of Porter v. Los Angeles, supra, has been brought forward by counsel for defendant as decisive of this case, yet in what manner it has any bearing is difficult to see. In that case the city put a tunnel under the street and the excavation caused a sinking of plaintiff's lot into the tunnel. The Superior Court held that the two year limitations applied because the land slide was a consequence of the city using its land; that therefore the action was case and not trespass. The Appellate and Supreme Courts held that the city had only an easement in the land; that easement was to use the surface of the land for a street. It was not to excavate under surface of the land to make a tunnel. That doing such was an added burden upon the easement. Hence the city in digging the tunnel was not doing what it had properly a right to do, and the slide was not in consequence of the doing of that rightful act, but it was something else than a rightful act, and by thereby drawing off the land from the side of the tunnel it was trespassing upon the property of plaintiff, and the action was trespass, hence the three limit prevailed.

Porter v. Los Angeles is notable and valuable to us here for the concurring opinion of Justice Olney in the case in the Supreme Court, 182 Calif. 515.

This is important for the guidance of this Court, for if a rule of the Supreme Court of the State does not commend itself to the United States Court that Court is not obliged to follow it. Justice Olney says:

> "I concur in the result and the main opinion with the single exception of its acceptance of the rule of Hicks v. Drew, 117 C. 305, as the settled law of this State. The rule to which I strongly except is that subdivision 2 of section 338 of the Code of Civil Procedure, when it provides a period of three years for 'an action of trespass upon real property' refers only to what were strictly actions for trespass at the common law and excludes actions for invasions of rights in real property for which at common law the remedy was not trespass but trespass on the case. The construction so put upon the section has the remarkable result that although one of the primary purposes of our reformed procedure was to do away with the refined and frequently illusory distinctions of the common law between forms of action, and although the fundamental theory of our law is that it is one of substantive rights for whose breach there is in all cases but one form of action, while the common law was essentially a law of remedies and forms of action were all important, yet the distinctions of the common law between forms of action are imported into our law and still maintained. This is done, furthermore, not in connection with the form of the particular action, but in a purely incidental connection, that of the period of limitation. No reason whatever can be assigned why such distinctions should be preserved. They are an anachronism in our law, alien to its fundamental theory. They make the rights of the parties to turn, as in this case, not upon the merits, but upon refined and subtile distinctions, whose perpetuation makes the rights of the parties in many cases, as here, difficult of ascertainment without any necessity for

> such difficulty. I believe that upon this point Hicks v. Drew should be overruled and the code section construed to mean that by trespass is meant any wrong to or invasion of rights in real property. Such is the usual meaning of the word 'trespass,' and such the meaning which has been given to it when used in similar statutes elsewhere (Cohn v. Bonnett, 62 Tex. 674; Bear v. Marx, 63 Tex. 298; Kelley v. Moore, 51 Ala. 364). A reading, also, of this particular provision in connection with the other code provisions concerning the period of limitations indicates that this was the sense in which the word was used. I would not take the view that Hicks v. Drew should be overruled if its overruling would have the effect of cutting off any existing right of action. But the only effect of overruling it would be to extend, not to limit, the time within which certain actions may be brought. This being the case, I think it should be overruled in the interest of the administration of justice by as plain and simple rules as possible."

Manifestly the rule based upon case or trespass which the Supreme Court has set up in the Hicks v. Drew and other cases is a mere fiction. Its quality is to confuse the practitioner, and of course it would confound a plaintiff unlearned in the law who tried to handle his own case. Section 339 says nothing about trespass on the case upon real property. The section that treats of trespass to real property is section 338 s. d. 2. Anyone reading it would suppose that it means any kind of invasion of real property, and the fact that such invasion may have occurred as a result of defendant using his own property would not likely be looked at. As Justice Olney says, the usual meaning of the word trespass is any

invasion of real property, and he cites authorities in support of this. Surely this was the idea of the legislature of California in enacting the law, for by an amendment of 1921, probably growing out of these very cases, subdivision 2 of section 338 was amended to read: "An action for trespass upon *or injury to* real property." This clears up the obscurity and leaves the law providing the three-year period for an action upon an injury to real property, getting rid of the over-refined distinction about the word trespass.

We submit that the judgment should be reversed and the case remanded for trial.

Dated, San Francisco,
April 29, 1922.

JOHN E. BENNETT,
OLIVER DIBBLE,
Attorneys for Plaintiffs in Error.